No. 88-2031

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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In their brief, respondents attempt to avoid the question presented by raising two newly-minted arguments—arguments neither presented to nor considered by the district court or the court of appeals, and not raised in respondents' opposition to certiorari. Even if these belated contentions were properly presented, they are unavailing.[1]

[1] There is some confusion over the treatment of the third count of the indictment, charging trespass. The district court stated that respondents were convicted "on each of three charges filed against them," including "trespass upon Postal Service property," and that "[f]or the purpose of sentencing the Magistrate considered the trespass charge to be merged into the other two charges." Pet. App. 23a. Indeed, respondents themselves *appealed* the Magistrate's action on the trespass count to the district court, alleging that the Maryland trespass statute was unconstitutionally vague. See Pet. App. 27a, 30a. The

1. Respondents begin by suggesting that this Court construe the "no-solicitation" regulation, 39 C.F.R. 232.1(h), as applying only to "interior, enclosed postal premises," Resp. Br. 9, and not to the outdoor access walkway on which respondents were arrested. *Id.* at 7-11. This revisionist approach is unfaithful to the express language of the regulation, which could not be clearer: The subsection entitled "[a]pplicability" states that "[t]his section applies to *all real property* under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering *in or on* such property." 39 C.F.R. 232.1(a) (emphasis added). Access walkways of the sort at issue are "real property under the charge and control of the Postal Service;" the "in or on" language would make no sense if the regulation applied only *inside* the post office building. Indeed, when it first promulgated what is now 39 C.F.R. 232.1(a)—the wording of which has not changed—the Postal Service explained that the regulations "shall apply without limitation to all buildings *and areas* owned or occupied by the Postal Service." 37 Fed. Reg. 24,346 (1972) (emphasis added).

Respondents' suggested redrafting of the regulation—to apply only to "interior, enclosed postal premises" (Resp. Br. 9)—fails to give proper deference to the Postal Service's consistent interpretaton. To be sure, the discussion accompanying the initial proposal and final notice of the present "no-solicitation" rule evinces a predominant concern with alleviating the effect of public solicitation, vending, and other activities within enclosed lobby areas. However, the Postal Service chose to apply its rule to

commitment order, however, shows acquittal on the third count. C.A. App. 116-117. In any event, the question before this Court is limited to the validity of the Postal Service regulation under which respondents were convicted.

activities "on postal premises" (Section 232.1(h)), rather than simply in "postal lobbies" and—in language admitting of no uncertainty—has explicitly provided in Section 232.1(a) that the regulation applies to "all real property." Moreover, it is the judgment of the Postal Service—a judgment comporting with common sense—that the practice of soliciting the public on walkways through which all postal customers must pass has many of the same undesirable effects on the Service's operations as soliciting conducted in postal lobbies. This Court should not lightly ignore the consistent, reasonable construction by a government agency of the regulations it has promulgated. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986).[2]

2. Respondents' second new argument is that "the indefiniteness of the meaning of unlawful 'solicitation,' particularly as the regulation is construed by the government, is so serious as to render the solicitation ban unconstitutionally vague." Resp. Br. 31. The vagueness doctrine is of no help to respondents. First, this Court need not judge the asserted effects of the rule on all speakers in the abstract, since respondents' actions at the Bowie post office constituted solicitation under any conceivable meaning of that word. See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976) ("[E]ven if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents."). Indeed, respondents do not suggest otherwise. See Resp. Br. 2 (respondents "solicited contributions to their organization"); see also Pet. App. 2a-3a, 12a-13a,

[2] Respondents recognized in their brief in opposition to certiorari that Section 232.1(h) "prohibits solicitation on the sidewalks of United States post offices." Br. in Opp. i. In their brief before the Fourth Circuit, they acknowledged that "[t]he Regulation bans all solicitation on postal property." Appellants' C.A. Br. 28.

26a (respondents requested contributions to their organization and actually sold subscriptions to the organization's newspaper).

Second, no vagueness-related dangers infect the no-solicitation rule at issue here. Although the term "solicitation" is not devoid of ambiguity, that feature, standing alone, does not amount to unconstitutional vagueness. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). The question, rather, is whether a term is readily susceptible to a narrow, definite construction that cabins the exercise of administrative discretion and can be easily understood by members of the public who might conceivably be affected by the regulation. See *American Mini Theatres*, 427 U.S. at 61 (where "the limited amount of uncertainty in [a law] is easily susceptible of a narrowing construction, we think [that the Court should not] adjudicate the hypothetical claims of persons not before the Court").

When judged by this standard, the Postal Service's no-solicitation regulation is not void for vagueness. "Solicitation" does not define "an offense so generalized as to be * * * not susceptible of exact definition." *Edwards* v. *South Carolina*, 372 U.S. 229, 237 (1963) (internal quotations omitted). And the prohibition in the regulation is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

The Postal Service has consistently interpreted unlawful solicitation on postal premises under Section 232.1(h) narrowly, so as to encompass statements or conduct directed at eliciting the *immediate* donation, or payment of funds

on the premises.[3] See, *e.g.*, Gov't Br. 39 (quoting *United States* v. *Belsky*, 799 F.2d 1485, 1489 n.9 (11th Cir. 1986)). Although the Postal Service has applied the term "solicitation " more narrowly than might be allowed under its dictionary definition (or, for that matter, under the First Amendment in this context), the meaning that the Service has attached to that term is sufficiently precise to survive the objection that the regulation is inherently vague. To the extent there may be ambiguity in the term "solicitation," the Postal Service's narrow and definite construction provides protection against arbitrary enforcement and a clear guide to the public [4] and the Postal Service officers charged with enforcement of the regulation.[5] Since "the boundaries of the forbidden areas [are] clearly marked,"

[3] The government has limited the scope of the regulatory definition to encompass solicitation that is most intrusive, and causes postal customers the most inconvenience and discomfiture, because it invites an "*immediate* act of charity." Gov't Br. 38 (quoting 43 Fed. Reg. 38,824 (1978) (emphasis added)). In addition, the government's narrow construction singles out expression that will result in an exchange of money *on the premises* – an activity that, because of its disruptive effect, the Postal Service is concerned to avoid. See Gov't Br. 38.

[4] Because postal personnel are regularly present on the premises of facilities covered by the regulation, members of the public can easily clarify any residual uncertainty concerning permissible activities. A would-be solicitor need only ask at the post office, and will be shown the regulations and given a simple explanation of the government's interpretation. Cf. Gov't Br. 27 n.9.

[5] This interpretation permits of ready answers to most of the hypotheticals that could be devised, which is all the Constitution requires. Cf. *Grayned*, 408 U.S. at 110 n.15 (brackets in original) ("It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.' ") (quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)). So, for example, speakers may "direct listeners to a companion waiting on the municipal sidewalk

Baggett v. *Bullitt*, 377 U.S. 360, 372 (1964), members of the public can know what acts are prohibited and avoid doing those acts. For their part, law enforcement officers will have no occasion to apply the regulation on "an *ad hoc* and subjective basis." *Grayned*, 408 U.S. at 109. See also *Kolender* v. *Lawson*, 461 U.S. 352, 357-362 (1983). Thus, none of the dangers presented by inherently vague proscriptions are present here. Respondents knew full well that they were engaged in an illegal act when they solicited funds at the Bowie post office. See Pet. App. 26a (respondent Kokinda "told the inspectors that she did not need to look at the regulations, since she already knew them").

3. Turning to the merits, respondents and their amici are understandably chary about relying on this Court's forum analysis. See, *e.g.*, Resp. Br. 13 ("the sidewalk at issue is a public forum, or at least is a public place wholly compatible with peaceful solicitation"); AFL-CIO Br. 20, 26-27 (contending that forum analysis is not helpful in this case); ACLU Br. 3 (urging the Court to jettison its forum analysis). That analysis begins with the proposition that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966). Contrary to the suggestion of respondents and their amici, the Postal Service does not lose this power simply because it grants the public a right of physical access to its property.

Respondents assert that "[t]his is not an access case." Resp. Br. 6. But of course it is. The Postal Service has *not* granted access to its walkways to all comers for all purposes; on the contrary, the regulation denies access to

some seventy feet away," or "*accept* an unsolicited contribution," but may not "provide a display of free literature and add an open cookie tin labelled 'Free-will offerings.' " See Resp. Br. 32.

those who wish to engage in solicitation. The fact that the Postal Service grants physical access to the public in order to carry out its function of delivering the mails does not mean that the Service has abandoned all restrictions on the use of its property, or that the property has become the equivalent of a Hyde Park.[6]

This Court has expressly rejected "the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer* v. *Spock*, 424 U.S. 828, 836 (1976). More recently, in *United States* v. *Grace*, 461 U.S. 171, 177 (1983), the Court reiterated that "[p]ublicly owned or operated property does not become a 'public

[6] Respondents and their amici seek to dismiss the significance of several cases in which this Court has found a governmentally controlled forum to be nonpublic. They argue that in those cases the public did not enjoy unrestricted physical access to the forum. See Resp. Br. 21; Society for Krishna Consciousness Br. (Krishna Br.) 19; AFL-CIO Br. 24; Free Speech Advocates Br. (Advocates Br.) 9-10 & n.13. But the concept of "physical access" to government property is entirely inapposite to the cases cited by respondents and amici to support their theory. It simply is not possible to issue an invitation to the public to be "physically" or "bodily" present in, or on, the Combined Federal Campaign (as in *Cornelius* v. *NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985)), advertising cards on public buses (see *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974)), a school mail system (see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)), or domestic mail boxes (see *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)). Similarly, such properties are not commonly "visited" or utilized by the public for business unrelated to any expressive purpose. It hardly follows, however, from the chance fact that several of the cases considering the forum status of government property involved a facility not amenable to "bodily" occupation, that the Court intended *sub silentio* to make physical access the dispositive factor in distinguishing public from nonpublic forums.

forum' simply because members of the public are permitted to come and go at will." See also *United States* v. *Albertini*, 472 U.S. 675, 686 (1985).

Respondents and their amici contend that the issue is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Resp. Br. 24-25 (quoting *Grayned*, 408 U.S. at 116). That approach would transform the power of the government "to preserve the property under its control for the use to which it is lawfully dedicated" (*Adderley*, 385 U.S. at 47) into nothing more than a right to exclude inconsistent uses. This Court's forum analysis, however, recognizes the right of the government as property owner to determine how its property will be used; the rule is not that the government must permit any use the property can bear. As this Court has held, "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 814 (1984).[7]

4. With respect to whether the Bowie post office walkway is a public forum, the essence of respondents' argument is that the walkway is just like a municipal sidewalk, and should be so treated for First Amendment purposes. Resp. Br. 5, 14-19. Like a municipal sidewalk, the Bowie post office walkway is "designed for public

[7] To the extent that the analysis in *Grayned* can be construed as an effort "to subject all public property to a single, unified regime of first amendment regulation," Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1732 (1987), it clearly has been superseded by subsequent decisions of this Court. See, *e.g.*, *id.* at 1741 (incorporation in *Greer* v. *Spock* and subsequent cases of "Justice Roberts' approach in *Hague* [v. *CIO*] fundamentally buried *Grayned*'s [incompatibility] inquiry" as the controlling test for identifying a public forum). See also Gov't Br. 28-29.

passage" (*id.* at 18), but there the similarity ends. Post office walkways linking postal facilities to off-street parking lots entirely on Postal Service property are built for one purpose only: to provide a passageway for persons going from their cars to the post office to conduct postal business. The Postal Service has the power to preserve the walkway for that dedicated purpose, and to determine that solicitation on the walkway detracts from that purpose.

In choosing a specific architectural plan for the Bowie post office, the government cannot be accused of doing what the Court forbade in *Grace*: attempting to "defeat the public forum status" of what would otherwise be a public forum—in that case, an ordinary municipal sidewalk—" 'by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.' " Resp. Br. 19 (quoting *Grace*, 461 U.S. at 180). See also *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). In this case, the government has not tried to *redefine* an ordinary municipal sidewalk as a nonpublic forum. Rather, by exercising its prerogative to choose an architectural, parking, and landscape design tailored to a particular location and serving its institutional purposes, the Postal Service has created an entity that is readily distinguishable from the sidewalks at issue in *Grace*: an offstreet access walkway that serves only one government building.

Although the forum status of the walkway at issue here turns in part on the geographic configuration of the postal property, that is as it should be. It is entirely appropriate to take into account the distinctive architectural characteristics of property, which are intentionally incorporated to accommodate institutional needs, in analyzing whether property is of the type traditionally or deliberately opened for expressive purposes, or whether the government in-

tends to preserve it for a specialized use. In designing the post office premises to serve post office needs, the Postal Service cannot be said to have consigned First Amendment rights to the "mercies of architectural chicanery." See Pet. App. 8a. In short, the Postal Service did not design the Bowie post office to stifle free speech, but to fulfill its congressionally mandated responsibilities.

The fact that some post office buildings are surrounded by municipal sidewalks – which are public forums – while other post office buildings – like this one – are not, is not an "arbitrary" result. Variations in the layout of the pedestrian access areas for postal buildings reflect legitimate efforts to accommodate the characteristics of the sites on which they are located. An efficient and safe arrangement in one location may be highly unsuitable in another. Unlike downtown post office buildings, suburban post offices are often located on high-speed, busy thoroughfares. The Bowie facility is a clear example of the latter category. Safety and convenience dictate that post offices in such locations be set well back from the highway, and that ample parking space be provided. The differing designs of postal premises reflect valid institutional requirements that have nothing to do with the suppression of ideas or speech; accordingly, the recognition of differing First Amendment status for the areas surrounding different post office buildings is no more arbitrary than treating sidewalks differently because of their location on jailhouse grounds or a military base. See *Adderley* v. *Florida*, *supra*; *Greer* v. *Spock*, *supra*.[6]

[6] Amicus AFL-CIO rests its argument on the claim that "[i]f the Bowie post office building • • • fronted on a municipally-owned sidewalk in a commercial area of a town," application of a no-solicitation regulation to that sidewalk would violate the First Amendment. AFL-CIO Br. 4. The short answer is that the Bowie post office building does *not* front on a municipally owned sidewalk in a commercial area of a town – it is over 75 feet away from a city sidewalk along a busy highway (Pet. App. 15a, 24a; J.A. 94-96) – and the Postal Service regulation at issue is limited by its terms to real property under the charge and control of the Postal Service (39 C.F.R. 232.1(a)). The fact that forum analysis leads to different results for different types of property should come as no surprise.

5. Respondents and several amici paint a somewhat idyllic picture of the post office as a "mecca," "where everyone meets to socialize and find out what is happening." Resp. Br. 22; see also Project for Public Spaces Br. 10-20; Newport News Br. 7-8. Congress, faced with footing the bill, had a less romantic mission in mind for the Postal Service: "it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 519-520 & n.13 (1984). Certainly some of the 35,000 postal facilities nationwide may serve as gathering places or even centers of social life, but it hardly follows that postal premises generally have been "clearly held in trust, either by tradition or recent convention, for the use of citizens" as a First Amendment forum. *Taxpayers for Vincent*, 466 U.S. at 815 n.32.

The anecdotes of respondents and amici notwithstanding, most postal facilities – and especially those located on busy suburban highways, such as the one at issue here – serve a well-defined, highly functional role directly related to the mission of the Postal Service, and in keeping with its congressionally mandated evolution into a competitive business enterprise. Correspondingly, the public regards the great majority of postal facilities as places not to pass the time, visit with friends, or discuss the global affairs of the day, but to transact postal business. And the Postal Service – with its thousands of facilities throughout the country – is entitled to draft its rules with the gen-

erality of cases in mind. See *Greenburgh Civic Ass'ns*, 453 U.S. at 133.[9]

6. Respondents erroneously assert that the no-solicitation regulation represents an improper attempt by the Postal Service to abrogate a public forum created by its own past practice of permitting certain speech activities. Resp. Br. 23. First, as we show in our opening brief (at 29-32 & n.10), the Postal Service has never "intentionally opened" the post office to all solicitors, as would be necessary to establish a "limited public forum" that would encompass this manner of expression. See *Cornelius*, 473 U.S. at 802. And the fact that the Postal Service permits its property to be used for certain *other* forms of expression – such as leafleting and picketing – does not evince an intent to permit *all* types of First Amend-

[9] It is also asserted that the public forum status of post office walkways follows from the historical role of the Postal Service in facilitating communication among far-flung communities. See Project for Public Spaces Br. 16-18; Newport News Br. 6-7; Resp. Br. 22. Implicit in this argument is the curious proposition that when the government engages in the business of communications, the physical property set aside for that purpose is automatically transformed into a First Amendment forum. On this reasoning, property belonging to a government-owned radio or television station, telegraph or telephone service, magazine, newspaper, or newsletter, would be available for leafleting, protesting, picketing or soliciting. Such a result would be untenable, and nothing in this Court's decisions suggests such a rule.

Some amici lament what they see as a gradual contraction of public spaces brought about by broad societal changes, such as the proliferation of suburbs. See Project for Public Spaces Br. 21-23; Libertarian and New Alliance Party Br. 5. Whatever may be the effects of such changes, this Court has never suggested that the overall quantity of public space open for public expression is a factor in deciding whether a specific piece of government property is available for this use.

ment activity. The government can deliberately designate a forum for use by a certain category of speakers (without regard to viewpoint), or for discourse on certain subjects, without thereby creating a general public forum open to all types of expression. *Cornelius*, 473 U.S. at 805; *Perry*, 460 U.S. at 47 ("selective access does not transform government property into a public forum"). Any other rule would perversely penalize the government for opening its property to any limited extent, and require a regime of no access unless the government were willing to grant access for all expressive purposes.

Contrary to respondents' suggestion (Br. at 23), it is perfectly permissible for the government to "alter the character of a forum" it previously opened for a defined expressive use. See *Cornelius*, 473 U.S. at 802. This does not mean that the government has limitless discretion over who to admit to the forum, or that the standards that constrain the government's conduct with regard to public forums it has created are "totally meaningless." Resp. Br. 23. As long as the government signals its intent to create a forum by allowing access to speakers or speech of one type, it may not arbitrarily exclude particular individuals that come within the scope of the designation. See, *e.g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555-557 (1975) (municipality may not pick and choose among theatrical productions to be presented at municipal theatre). However, once the government decides – as it did here – that an open forum for a particular mode of expression interferes with its institutional needs, it can eliminate that mode of expression categorically.[10]

[10] For a similar reason, the ACLU is wrong to suggest (Br. 7-8) that the "limited" or designated public forum is a bogus category because there is no meaningful difference between a limited and nonpublic forum. By definition, all designated forums are provisional – in that the government may revoke access for the limited category of speech

7. Respondents and amici challenge the government's argument that, even assuming the access walkway is a public forum, the no-solicitation regulation still withstands scrutiny as a valid time, place, or manner regulation. See Gov't Br. 42-49. They argue that the decision to single out solicitation is based only on an "undifferentiated * * * apprehension of disturbance," Advocates Br. 23 (citing *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 508 (1969)), and that the regulation is broader than necessary to serve the articulated interests of the Postal Service, see Resp. Br. 27-30. Respondents and their amici have their own suggestions for addressing the undesirable effects of solicitation, in ways they claim would not interfere with the Postal Service's mission of accomplishing

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that defines the forum – but the designation of a forum by the government precludes any effort at selective access within the category of permitted speech.

The ACLU also criticizes this Court's public forum doctrine as hopelessly incoherent in the wake of *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), where the Court held that, regardless of whether an airport was a public forum, it was unreasonable – and thus impermissible – to exclude from the airport *all* "First Amendment activities." *Id.* at 574-575. According to the ACLU, Br. 7, the Court in that case collapsed the categories of public and nonpublic forums by holding that "the defining trait of the traditional forum (that it can't be closed to all expression)" sometimes applied to nontraditional forums as well. In fact, the Court's analysis in *Jews for Jesus* did not abrogate all pre-existing distinctions between nonpublic and public forums. This Court has never held that *any* restriction on First Amendment activity, no matter how unreasonable or unrelated to any conceivable governmental purpose, is permissible in a nonpublic forum. On the contrary, as stated in *Perry Educ. Ass'n*, 460 U.S. at 46 (emphasis added), the government may reserve nonforum property for purposes unrelated to speech, but only "as long as the [restriction] on speech is *reasonable*." In a public forum, in contrast, a mere showing of "reasonableness" would not justify significant limitations on expressive activity.

the expeditious delivery of over 100 billion pieces of mail each year. *Ibid.*; see Newport News Br. 20; Advocates Br. 26-27. See Gov't Br. 12.

These objections and suggestions fail to take into account the nature of the Postal Service. The Postal Service has been charged by Congress with the responsibility of operating in a manner that will enable it to achieve economic self-sufficiency. See Gov't Br. 3-4, 39-42, 49. This organization must therefore place the highest priority on customer satisfaction and smooth, cost effective operation in order to fulfill its mandate. A special sensitivity to customer reaction and to any factor that might detract from the business-like operation of the Postal Service is therefore appropriate in weighing any burdens on speech against administrative demands. In light of these considerations, the record in this case (see *id.* at 36 & n.11), and the nature of solicitation itself as a highly intrusive form of expression (see *id.* at 37-39), it is plain that the Postal Service has established the legitimacy of the concerns underlying the regulation at issue. Solicitors at the Bowie post office and elsewhere *have* caused disturbance, dissatisfaction, and inconvenience to the Postal Service; the Service should be permitted to take the necessary steps to eliminate these conditions.

The suggestions that the Postal Service establish a "first-come first-served" system of selective access, see Advocates Br. 26,[11] or that it simply rely on other regulations

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[11] Amicus Free Speech Advocates, Br. 26-27, recommend that the Postal Service adopt rules similar to those promulgated by the Federal Aviation Administration, which has created a "first-come first-served" permit system for solicitation and other speech activities by the public at Dulles and Washington National airports. However, amicus fails to note that a similar system had been in place for years at post offices, and, after considerable experience, was rejected as imposing intolerable burdens incompatible with the operation of the postal

forbidding obstruction, interference, or disruption (Section 232.1(e)) or the "creating [of] any hazard" (Section 232.1(c)), see Resp. Br. 29, should also be rejected. As discussed in our opening brief, at 40-42, the demands of operating a permit system would obviously distract postal personnel from postal duties, which must be their primary concern.[12] Alternatively, enforcement of Section 232.1(e) or (c) against individual solicitors is an ineffective and highly inefficient method for solving the systemic problems generated by the competing demands of private parties for post office space and postal patron attention.

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system nationwide. See Gov't Br. 30-31 & n.10, 37-42. For similar reasons, this case is unlike *Sable Communications, Inc.* v. *FCC*, 109 S. Ct. 2829, 2838 (1989), in which the Court struck down a ban on sexually explicit commercial telephone messages. See Advocates Br. 11 & n.15. In that case, the record was devoid of evidence that the agency had either studied or tested a less restrictive system for protecting children from access to such messages. In this case, in contrast, the decision to tighten restrictions was based on long experience, which demonstrated that previous methods were unworkable.

In any event, the FAA's judgment that a permit system for airports is practicable and compatible with overall institutional priorities can have little significance for this case. The Postal Service and its facilities cannot be compared to airports with regard to such factors as the scope and nature of the mission, the characteristics, layout, and usage patterns of the property, the availability of resources or personnel to monitor public activities on the property, the degree of demand for space compared to the space available, and the institutional emphasis on economic self-sufficiency and efficiency. In the same vein, the court of appeals decisions declaring airports to be public forums (see Krishna Br. 16; Newport News Br. 18) have little to teach this Court with regard to the status of postal facilities, since post offices and airports differ in many key respects that are pivotal in determining whether property qualifies as a public forum.

[12] Respondents concede (Br. 29) that "[a] complex system of permits and placement rules for solicitors could entail a fair amount of administrative inconvenience."

First, *post hoc* monitoring under Section 232.1(e) and (c) would place intolerable demands on the Postal Service, since it would require the provision of security personnel to monitor compliance and enforce limits. Most important, regulation of the use of postal premises solely through the application of these regulations would disable the Postal Service from taking into account the negative aggregate effects of the high volume of solicitors that ordinarily demand access to postal premises to conduct charitable sales and political fundraising. See *Clark* v. *CCNV*, 468 U.S. 288, 296-297 (1984) ("[T]he validity of [a] regulation need not be judged solely by reference to the demonstration at hand."); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981).

The sheer volume of demand for access by community groups for charitable and political solicitation was in large part responsible for the failure of the Postal Service's previous attempts to permit limited access. A resurgence of use for this purpose can be expected to create serious problems of administration and order if the current regulation is struck down. The ability to discipline selected solicitors for "obstruction, interference, and disruption" (Resp. Br. 29) will not eliminate all negative effects of this highly intrusive, nonmission-related activity.[13]

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[13] The amicus filings in support of respondents in this case provide a good sampling of the range of groups interested in using post office property for their own purposes—political parties (Libertarian and New Alliance Party Br.), newspapers (Newport News Br.), labor organizations (AFL-CIO Br.), the ACLU (ACLU Br.), and religious groups (Krishna Br.). The record provides evidence of others, see, *e.g.*, J.A. 59 (Girl Scouts). Responding to the competing demands of such a wide variety of groups would impose intolerable demands on postmasters nationwide, and present the real danger of selective access and unequal application of the law in the far-flung postal network.

8. Respondents characterize the challenged regulation as "tantamount to a content-based" restriction because it only bars speech that expresses an appeal for funds. Resp. Br. 26. Although we believe that it is more accurate to regard the regulation as a limitation on a particular "manner" of expression (see Gov't Br. 43), the fact that the regulation can be said to draw a distinction based on the meaning of words uttered by the speaker does not render it suspect in this context. "The essence of th[e] rule" that subject matter restrictions are ordinarily subject to close scrutiny "is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 67 (plurality opinion). As explained in our opening brief, at 36-37, it is the solicitor's presence and generic behavior as a seeker of funds, not his message or point of view, that generates undesirable consequences. The Postal Service is only concerned with eliminating the unfortunate "secondary effects" of the practice of requesting money from its customers,[14] not

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As noted in our opening brief, that was in fact the experience of the Postal Service when it *tried* a system that permitted solicitation on postal premises. See Gov't Br. 41-42; see also *United States* v. *Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986) (in upholding the regulation, stating that "[i]f solicitation were permitted on postal grounds, it is unlikely that appellants' group would be the only organization to take advantage of it; the result could be considerable disruption of postal activities").

[14] In this regard, it is illuminating to contrast this case with, for example, *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972), in which the Court struck down an ordinance prohibiting demonstrations near a school, with an exception for peaceful labor picketing. The "subject matter" distinction in that case, unlike this one, was not based on any inherent disparity in the extent to which different categories of speech would create the effect—"disruption of [a]

with protecting listeners from unwelcome or irritating ideas or suppressing thoughts or ideologies. In other words, the predominant purpose of the restriction is totally "unrelated to the suppression of free expression," *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), and is "justified without reference to the content of the regulated speech," *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

Moreover, the distinction among types of speech in the regulation has the desirable effect of enabling the Postal Service to achieve the most minimally restrictive system that is consistent with its service needs by banning one narrowly defined type of speech while leaving the public free to engage in a range of other types of expression. The regulation bans *only* speech that proposes an immediate contribution or transaction, and is no more extensive than necessary to minimize the undesirable consequences of this form of expression. See Gov't Br. 36-39.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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school"—that the ordinance was designed to avoid. *Id.* at 99. Rather, in making a "content based" distinction that could not be justified in terms of undesirable "secondary effects," the ordinance implicitly evinced a judgment that speech on one subject was more important than on others. No such judgment is implicated by the regulation at issue here.

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